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POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Transferring Bound Printed Matter Parcels to the Competitive Product List	Docket No. MC2021-78

PUBLIC REPRESENTATIVE COMMENTS

(May 17, 2021)

On March 26, 2021, the United States Postal Service (Postal Service) filed a request with the Postal Regulatory Commission (Commission) pursuant to 39 U.S.C. § 3642 and 39 C.F.R. § 3040.130 *et seq*. in this docket to transfer Bound Printed Matter (BPM) Parcels from the Market Dominant product list to the Competitive product list.[1] The Commission issued a public notice of the Request on March 30, 2021, requesting comments by interested persons.[2] The Public Representative hereby respectfully submits the following comments on the Postal Service's Request.

Based on the relevant statutory guidelines and Commission precedent, the Public Representative finds that BPM Parcels qualifies as a Competitive product. At the same time, the Public Representative is mindful of the concerns expressed by the parties that have chosen to participate in the proceeding. As such, the Public Representative also suggests that the Commission and the Postal Service explore the feasibility of introducing destination entry rates to Library Mail, for which Scholastic, Inc. (Scholastic) (or other smaller customers) may be eligible.

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[1] *See* United States Postal Service Request to Transfer Bound Printed Matter Parcels to the Competitive Product List, March 26, 2021, at 1 (Request).

[2] Notice and Order Concerning Transfer of Bound Printed Matter Parcels to the Competitive Product List, March 30, 2021, at 3 (Order No. 5856).

I. BACKGROUND

BPM Parcels is a parcel product, currently located within the Package Services class, comprised of printed matter consisting of advertising, promotional, directory, or editorial material.[3] Sheets within a piece must be securely bound by a permanent fastening and at least 90 percent of sheets must be imprinted by a process other than handwriting or typewriting. DMM § 263.2.1.d, e. Pieces may weigh up to 15 pounds. *Id.* § 263.2.1.b.

The Postal Service notes that the BPM Parcels product is not available to customers at its retail windows, but instead is available only to commercial customers paying by permit. Request at 4. "[P]rices are paid per piece and per pound for Carrier Route, Presorted, and Destination Entry mailings of 300 pieces or more" and by weight and zone for non-presorted mailings. *Id.* "Transportation of BPM Parcels is by ground, with a service standard of 2 – 9 days, though the Postal Service does not guarantee delivery within this time." *Id.*

Accordingly, the Postal Service asserts that "BPM Parcels typically carry books, other non-advertising publications, and larger catalogs[,]" while "[s]maller catalogs and advertising material are more typically mailed as BPM Flats, a separate product." *Id.* Moreover, the Postal Service explains that it "believes that approximately two-thirds of BPM Parcel volume is shipped to consumers, while the other one-third is shipped to businesses." *Id.*

The Postal Service explains that its Request is "the fifth in a series of requests to transfer domestic parcel products to the competitive product list": Docket No. MC2010-36 (Transfer of Commercial Standard Mail Parcels); Docket No. MC2011-22 (Transfer of Commercial First-Class Mail Parcels); Docket No. MC2012-13 (Transfer of Parcel Post); and Docket No. MC2015-7 (Transfer of Retail First-Class Mail Parcels) (collectively, the Prior Parcel Transfer Cases). *See id.* at 1. In all four of the Prior Parcel

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[3] United States Postal Service, Mailing Standards of the United States Postal Service, Domestic Mail Manual, January 24, 2021, § 263.2.1.c (DMM).

Transfer Cases, the Commission eventually transferred the parcel product in question from the Market Dominant product list to the Competitive product list.[4]

II. DISCUSSION

As the Commission has previously recognized, the transfer of products between the Market Dominant and Competitive products list is governed by several statutory provisions—in particular, section 3642(b), which sets forth the criteria for Commission determinations regarding the addition of products to, removal of products from, and transfer of products (or components of a product) between the two lists, and section 3633, which sets forth provisions applicable to the rates for Competitive products.[5] Because BPM Parcels meets the requirements of both of these sections, the Public Representative determines that BPM Parcels qualifies for transfer to the Competitive product list.

A. Compliance with Section 3642

The Commission may consider a change to a product's Market Dominant or Competitive designation upon request of the Postal Service, request of users of the mails, or upon its own initiative. 39 U.S.C. § 3642(a). The criteria for assigning a product to either the Market Dominant or Competitive product list is set forth in 39 U.S.C. § 3642(b).

1. Section 3642(b)(1)—Market Power

39 U.S.C. § 3642(b)(1), also known as the "market power test," specifies that:

> The market-dominant category of products shall consist of each product in the sale of which the Postal Service exercises sufficient market power that it can effectively set

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[4] *See, e.g.,* Docket No. MC2015-7, Order Conditionally Approving Transfer, July 20, 2017, at 24-26, 40 (Order No. 4009).

[5] *See* Order No. 4009 (citing 39 U.S.C. §§ 3633, 3642).

> the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products. The competitive category of products shall consist of all other products.

Id. In order to determine whether the Postal Service exercises this degree of market power, the Commission must: (1) define the market segment in which the given product operates; (2) identify the potential competition and associated competitive products; and finally (3) apply the market power test specified in 39 U.S.C. § 3642(b)(1). *See* Order No. 4009 at 11, 24. The Postal Service has a "relatively rigorous" burden to show that its product is entitled to a transfer, although "because there is an assumption that the product and the marketplace is already understood, the burden upon the proponent to produce that evidence should be relatively low." *Id.* at 29.

a. Market Segment

In the past, when determining a product's market segment, the Commission has looked at several different characteristics, including: (1) the specific usage of, and/or customer base for, the product; (2) the method by which the product is transported (*i.e.*, ground versus air); (3) the service standard applicable to the product; (4) the size and weight of the product; (5) content restrictions; and (6) the product's pricing. *See, e.g.,* Order No. 4009 at 15-18. Some of these qualities—content restrictions, size and weight limitations—strictly segment the relevant market, meaning that a company must match these characteristics in order to qualify as a competing product within the market. On the other hand, other qualities—such as pricing, delivery standards and overall network quality—are "slack," and a product need not perfectly satisfy those qualities in order to be substitutable.

Additionally, in analyzing segments in the delivery market, it is useful to consider which parts of the network the product in question serves. Typical economic models of the delivery market split the delivery market into two components: upstream (processing) and downstream (delivery).[6] Shippers are able to choose separate firms to handle upstream and downstream services, as demonstrated by products such as SurePost and SmartPost (in which United Parcel Service, Inc. (UPS) and FedEx Corporation (FedEx), respectively, provide upstream service while utilizing the Postal Service to provide downstream delivery). *See* Request at 8-9. Products that serve both upstream and downstream market components are generally referred to as "end-to-end" products. BPM Parcels can be mailed both at origin or dropshipped at destination, and thus serve both the end-to-end and the downstream market. *See id.* at 9. As such, both components should be considered in a market segment analysis.

Here, the Postal Service explains that BPM Parcels has a maximum weight of 15 pounds, a delivery standard of 2 to 9 days using ground transportation, and inexpensive prices around 2 to 5 dollars. *Id.* at 6-7. It also notes that BPM Parcels' content is restricted "to advertising, promotional, directory, or editorial material (or any combination thereof), including books, while printed matter 'in the nature of personal correspondence' – a letter – is specifically excluded." *Id.* at 16 (internal citations excluded). The Postal Service also includes a Library Reference, filed under seal, which demonstrates that the top 20 customers accounted for 93.4 percent of BPM Parcels volume in FY 2020.[7]

The Postal Service asserts that the market segment in which BPM Parcels competes is "inexpensive, ground delivery of light- to moderate-weight packages containing books, catalogs, and similar printed matter to individuals and businesses." *Id.* at 6.

Scholastic, one of the parties that participated in this proceeding, defines the market for BPM Parcels somewhat differently. In its motion for the issuance of an information request, Scholastic points out that it uses BPM Parcels to "deliver[] millions

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[6] United States Postal Service, Office of Inspector General, Report No. RARC-WP-16-002, Co-opetition in Parcel Delivery: An Exploratory Analysis, November 2, 2015, at 9, 11, available at *https://www.uspsoig.gov/sites/default/files/document-library-files/2015/RARC-WP-16-002.pdf*.

[7] *Id.* at 11-12 (citing Library Reference USPS-LR-MC2021-78/NP1, March 26, 2021).

of classroom magazines and Scholastic Book Club Kits annually to schools across America," and that "there is no effective competition for [this] educational multi-component bundles sub-product."[8] However, Scholastic's claim relies on a market that is drawn narrower than the one germane to the section 3642(b)(1) analysis. The bundles that Scholastic ships *can* be sent using other products, albeit at different prices. In other words, other products (discussed in the next section) meet the strict segment conditions discussed above. While firms may not explicitly compete for Scholastic's business in particular, *see* Scholastic Motion at 2, they do offer products that Scholastic can use to ship its goods.

The Public Representative agrees generally with the Postal Service's definition of the relevant market segment for BPM Parcels.

b. Competitors and Competitive Products

The next step in this analysis is to determine which companies and products compete in the market segment identified above. The Postal Service asserts that "[w]hether or not products should be included in the relevant market or market segment is a function of whether the products are reasonably interchangeable."[9] The Commission has explained that "[t]he concept of reasonable interchangeability of use involves consideration of the purposes for which the products are produced- price, use and qualities considered." Order No. 2306 at 16 (cleaned up). "The functional similarity of products can support their inclusion in the same relevant product market." *Id.* Additionally, "[t]he assessment of product interchangeability can also involve consideration of customer views, as well as industry or public perceptions of markets or a firm's perception of who its competitors are." *Id.*

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[8] Motion of Scholastic Inc. for Issuance of Information Request, April 9, 2021, at 1-2 (Scholastic Motion).

[9] Request at 6 (citing Docket Nos. MC2013 and CP2013-75, Order Denying Request, December 23, 2014, at 18 (Order No. 2306)).

According to the Postal Service, BPM Parcels competes with UPS's and FedEx's "Ground" products. Request at 6-7. These products contain no content restriction, charge by the pound and by zone for ground deliveries up to 150 pounds, and deliver within 5 days in the continental United States. *Id.* at 7. The Postal Service asserts that "[a]ny package a customer could send using BPM Parcels, it could, in the alternative, send as a UPS or FedEx Ground package." *Id.* Though it concedes that UPS and FedEx Ground prices are higher by several multiples, it claims that they "are at least comparable" to those of BPM Parcels, and also argues that "UPS and FedEx commercial customers generally do not pay published rates but rather obtain negotiated rates such that the average rates actually paid are lower than the published rates would suggest."[10]

According to the Postal Service, BPM Parcels also competes with "other, 'hybrid' products offered by shippers including UPS, FedEx, and other large, widely recognized competitors." Request at 8. For these products, "[t]he shippers resell BPM Parcel delivery to their customers and use the Postal Service for delivery by entering packages into the mailstream as BPM Parcels." *Id.* For instance, according to the Postal Service, FedEx offers "SmartPost for commercial customers, a product where 'Shipments are made via FedEx Ground to the U.S. Postal Service (USPS) system destination closest to your customer, and the postal worker carries it the last leg" using BPM Parcels and other postal products. *Id.* at 8-9.

As discussed above, BPM Parcels competes in both the downstream and end-to-end markets. The downstream market—which relies on last-mile delivery—has fewer

[10] *Id.* at 7-8. In Docket No. MC2010-36, the Commission analyzed a product similar to BPM Parcels and also concluded that its competition came in the form of UPS and FedEx products. *See* Docket No. MC2010-36, Order Conditionally Granting Request to Transfer Commercial Standard Mail Parcels to the Competitive Product List, March 2, 2011, at 6-8, 16 (Order No. 689). The product at issue—Commercial Standard Mail Parcels—was intended for commercial mailers of lightweight parcels, was transported entirely by ground, prohibited letter content, was required to consist of over 200 pieces (or 50 pounds), and had a three-to-ten day service standard for the contiguous United States. *See* Order No. 4009 at 15. The Commission concluded that Commercial Standard Mail Parcels competed in the ground shipping market for lightweight parcels, which included competition primarily from UPS and FedEx. *See* Order No. 689 at 8-9, 14, 16.

competitors. First, BPM Parcels competes with other downstream Postal Service products, including Parcel Select and Parcel Select Lightweight, which also possess destination entry prices and a similar weight limit. BPM Parcels also competes with other downstream shipping services, including Amazon’s last-mile services, Walmart, and other, smaller last-mile shippers. *See, e.g., id.* at 13.

The end-to-end market has significantly more competitors. First, BPM Parcels competes with other end-to-end Postal Service products, including Parcel Select, Parcel Select Lightweight, and Retail Ground. Second, BPM Parcels competes with UPS and FedEx end-to-end offerings, primarily ground offerings. *See id.* at 7-8. Third, BPM Parcels competes with combinations of upstream and downstream products, such as SurePost and SmartPost, which use downstream BPM Parcels in conjunction with competitors’ upstream networks.[11]

c. Market Power Test

As explained above, in order to determine whether a product has sufficient market power to exclude it from the Competitive product list, the Commission must analyze whether “the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.” 39 U.S.C. § 3642(b)(1). The Commission has previously explained that “[t]he law does not require a certainty that business will be lost if prices are raised either significantly or significantly above costs.” Order No. 689 at 14-15. “Rather, section 3642(b) provides that when there is a risk of losing a significant level of business to other firms offering similar products, a product (or subordinate unit) will not be classified as market dominant.” *Id.* at 15. For the following reasons, the Postal Service has demonstrated that this risk exists.

[11] *See id.* at 8-9. As such, end-to-end BPM Parcels can indirectly compete with downstream BPM Parcels, when the latter are used as part of a competing end-to-end product.

(1) BPM Parcels Lacks Significant Market Power

According to the Postal Service, the fact that BPM Parcels lacks sufficient market power to raise prices substantially above costs or raise them significantly without a risk of losing a significant level of business “is shown by two things: the existence of robust competition and large customers that are also competitors with their own end-to-end delivery networks.” Request at 10. It argues that if it were the sole operator in the relevant market with last-mile delivery capabilities, BPM Parcels could conceivably be considered Market Dominant, as customers “would be compelled to route their packages through the Postal Service,” allowing the Postal Service to raise its prices or degrade its service “with impunity.” *Id.* The Postal Service points out that reality is quite different than this hypothetical: 62.7 percent of BPM Parcels was shipped by entities with their own last-mile delivery capabilities, while another 26 percent was entered “by large logistical entities” that are “sophisticated enough to obtain last-mile delivery” from other sources. *Id.* at 10-11.

Further, the Postal Service notes that beyond the large “logistics-capable entities, approximately 30 percent of volume was entered by a mix of publishers, booksellers, financial institutions, and product sellers” who could negotiate their own competitive contract rates. *Id.* at 12.

As such, the Postal Service asserts that “should BPM Parcels see either a significant rate increase or significant degradation in service[,]” the vast majority of BPM Parcel volume would be at risk of immediate diversion. *Id.* at 10-11.

The Public Representative agrees that the Postal Service has demonstrated that, should it “set the price of [BPM Parcels] substantially above costs, raise prices significantly, decrease quality, or decrease output[,]” there would be at least some risk of losing a significant level of its BPM Parcels business. Almost 63 percent of BPM Parcels volume could be immediately diverted should its largest customers choose to bring their last-mile delivery in-house as a result of changes to BPM Parcels prices. *See* Request at 10. This does not take into account that a further 20 percent of BPM Parcel customers are large, sophisticated entities that also have other shipping options should

BPM Parcels' rates or service change significantly.[12] This alone is enough to demonstrate that BPM Parcels is not a Market Dominant product.

Furthermore, under the standards applied by the Commission in the Prior Parcel Transfer Cases, BPM Parcels is not Market Dominant. In the Prior Parcel Transfer Cases, the Commission looked at a number of factors to determine that the products in question were not Market Dominant, two of which are relevant here. Specifically, the Commission analyzed: (1) the share of volume possessed by the relevant product in the market identified by the Postal Service;[13] and (2) whether the products identified as competitive to the product to be transferred have other, better features that could cause the transferred product to lose market share.[14] Though the market share data for BPM Parcels is inconclusive, the difference in features between BPM Parcels and its competitors suggests it operates in a Competitive market.

In terms of the first factor, the Commission previously looked at market share in all of the Prior Parcel Transfer cases, finding that the shares were insufficient to show that the products were Market Dominant. The following shares of the relevant markets (by volume) were found insufficient to show market power:

Docket	**Relevant Market & Share (%)**
Docket No. MC2010-36	Under 1 lb ground parcel: 79.2 Total ground parcel: 20.1
Docket No. MC2011-22	Total under 1 lb parcel: 44
Docket No. MC2012-13	Retail ground parcel: 17.6 Total ground parcel: 1.1
Docket No. MC2015-7	Total 2-3 day and ground (under 1 lb) parcel: 8.8 Total 2-3 day and ground (up to 70 lbs) parcel: 2.1 Total parcel: 1.9

Source: Order No. 4009 at 31-34; Order No. 1411 at 5-6; Order No. 710 at 5-6; Order No. 689 at 7, 14-15.

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[12] *Id.* at 10-12. Thus, the larger corporate users of BPM Parcels have significant "buyer market power" (also referred to as "oligopsony power"). In the case of Market Dominant products, in which the Postal Service cannot easily price discriminate, this buyer market power also benefits smaller shippers.

[13] *See* Order No. 4009 at 31-34; Docket No. MC2012-13, Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, July 19, 2012, at 5-6 (Order No. 1411); Docket No. MC2011-22, Order Adding Lightweight Commercial Parcels to the Competitive Product List, April 6, 2011, at 5-6 (Order No. 710); Order No. 689 at 7, 14-14.

[14] *See* Order No. 1411 at 5-6.

Initially, the Postal Service's data would seem to indicate that BPM Parcels comprises 3.8 percent of the market it shares with UPS Ground and FedEx Ground.[15] In light of the Postal Service's non-compensatory rates for BPM Parcels, and much higher market-driven prices for UPS and FedEx, a much higher market share for BPM Parcels could be reasonably expected. At first blush, this relatively modest share, when compared to the Prior Parcel Transfer Cases, would suggest that BPM Parcels lacks significant market power.

However, the Public Representative notes that this 3.8 percent share may not be completely representative of the portion of the actual market in which BPM Parcels competes. The Postal Service obtains this share by dividing the volume share of BPM Parcels by the total volume of BPM Parcels along with UPS Ground and FedEx Ground. *See* Response to CHIR No. 3, question 1. However, as discussed above, BPM Parcels is content-restricted while UPS and FedEx Ground are unrestricted as to content, *see* Request at 3-4, 7, thus resulting in a mismatch for the purpose of calculating market share. In addition, Amazon and other shippers who send similar packages have been left out of the calculation completely. *See* Response to CHIR No. 3, question 1. As a result, market share is a limited (and potentially misleading) measurement of market power in this case, and should not be relied upon to determine whether BPM Parcels should be added to the Competitive product list.[16]

Finally, as mentioned above, the Commission has also looked at the presence of other, better features offered by competitors to show that a Postal Service product is at risk of losing significant business should it raise its prices or decrease its service. *See* Order No. 1411 at 5-6. In this case, the Postal Service explains that even though BPM Parcels' prices are significantly lower than those of its competitors, "the cost of the higher UPS and FedEx list prices pays, in part, for additional features not offered by

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[15] *See* Responses of the United States Postal Service to Questions 1-6 and 8-9 to Chairman's Information Request No. 3, April 23, 2021, question 1 (Response to CHIR No. 3).

[16] *See generally* Dennis W. Carlton, Market Definition: Use and Abuse, United States Department of Justice (April 2007), available at *https://www.justice.gov/atr/market-definition-use-and-abuse*.

BPM Parcels, such as the five-day delivery guarantee within the continental United States and a much higher weight limit." Request at 7. To the extent that shippers prefer these qualities, an increase in BPM Parcels prices could induce substitution to those higher-quality products. Again, this suggests that BPM Parcels is at risk of losing significant business should the Postal Service significantly increase its prices.

(2) The "Small but Significant Non-Transitory Increase in Price" Test

With its inquiry regarding the Department of Justice's Horizontal Merger Guidelines, the Association for Postal Commerce (PostCom) raises the notion of using a 5 percent increase in price as a measuring stick to determine whether the Postal Service could raise prices significantly without losing significant business to other firms.[17] As PostCom points out, 5 percent is often used as a benchmark under the Horizontal Merger Guideline's "small but significant increase in price" (SSNIP) test, used to define a product's market (*i.e.*, the other firms offering similar products). *See* PostCom Motion at 3-4.

For its own part, the Postal Service believes that "the five percent measure for a small but significant increase in price (SSNIP) has no significance here."[18] It explains that "under the Horizontal Merger Guidelines cited, the test for significance in a price increase is measured not from *current* prices but rather from *competitive* prices." *Id.* (emphasis in original). According to the Postal Service, "to be significant, a price increase must be an increase from competitive prices the market would set rather than prices that are set by regulation or that are artificially low." *Id.* It points out that "[t]he Commission has previously applied the standard in this way and in this same context."

[17] *See* Motion of the Association for Postal Commerce for Issuance of Information Request, April 13, 2021, at 3-4 (PostCom Motion).

[18] Responses of the United States Postal Service to Questions 1 – 3a and 4b of Chairman's Information Request No. 2, April 22, 2021, question 3.a (Response to CHIR No. 2).

Id. (citing Order No. 689 at 16) (noting that "[a]ny pricing power the Postal Service may enjoy is illusory based on its pricing under one-pound parcels below cost").

The Public Representative agrees that the SSNIP test is not particularly helpful in the current analysis. As an initial matter, as explained above, the analysis under section 3642(b)(1) requires the Commission to: (1) define the relevant market segment; (2) identify potential competition; and (3) apply the market power test. *See* Order No. 4009 at 11, 24. The SSNIP test is not designed to aid in the last step of the inquiry (by providing a benchmark for a "significant" increase in prices under section 3642(b)(1)), but can rather help the Commission only with the former steps, in which the Commission defines the market.[19]

Even in its proper context, the SSNIP test proves less than helpful here. First and foremost, because the SSNIP test presumes that the prices to be tested are competitive,[20] it is inappropriate to apply the test to prices for BPM Parcels, which have been constrained by the price cap applicable to Market Dominant products. Beginning the analysis at regulated prices and increasing prices by only 5 percent would nullify the Congressional intent in setting up a framework for transfers between the Market Dominant and Competitive product lists.[21] That is because, under this approach, a

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[19] *See* Docket No. MC2012-14/R2012-8, Order Approving Addition of Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market Dominant Product List, August 23, 2012, at 24-25 (Order No. 1448) (the SSNIP test "is used to identify a set of products that is reasonably substitutable for a product sold by one of the merging firms" and "is instructive in determining the appropriate size of a market for evaluating potential adverse competitive effects").

[20] This requirement is part of "well-settled economic and competition principles." *Mobil Pipe Line Co. v. F.E.R.C.*, 676 F.3d 1098, 1100 (D.C. Cir. 2012) (characterizing the Federal Energy Regulatory Commission's definition of "market power" as "the ability profitably to maintain prices above *competitive levels* for a significant period of time") (internal quotation marks omitted, emphasis added); *see also* United States Department of Justice and Federal Trade Commission, Commentary on the Horizontal Merger Guidelines, March 2006, at 1, available at *https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf* ("'market power' may be defined as the ability profitably to maintain prices above competitive levels for a significant period of time").

[21] Furthermore, in the Prior Parcel Transfer Cases, the Commission has refrained from using a 5 percent increase in prices as a proxy for a "significant" price increase. In fact the Commission has previously approved the competitive classification of a parcel product where the Postal Service required a 15 percent price increase to achieve cost coverage. *See* Order No. 1411 at 10. Thus, the Commission

Market Dominant product that unmistakably competes with private firms could nonetheless remain permanently relegated to the Market Dominant list merely because its current prices, which are largely a function of regulation, remain so low that a 5 percent increase in price would always be low enough to insulate the Postal Service from loss in business. As explained above, until prices reach a competitive level, a 5 percent increase is not necessarily "significant."

Second, the Postal Service is a "multi-product firm" in that it produces a variety of (imperfectly) substitutable parcel products. Using the SSNIP test to define the market for BPM Parcels alone risks conflating business lost to competitors with business lost to other Postal Service products. Because section 3462(b)(1) discusses only the "risk of losing a significant level of business to *other firms offering similar products*[,]" the SSNIP test may produce results that are unsuited to the Commission's analysis.

2. Section 39 U.S.C. 3642(b)(2) – Postal Monopoly

In determining whether a product may be transferred to the Competitive product list, the Commission must also determine whether it is subject to the postal monopoly. A product subject to the postal monopoly may not be transferred from the Market Dominant product list. *See* 39 U.S.C. § 3642(b)(2). The Postal Service asserts that BPM Parcels falls outside the scope of the letter monopoly because it does not contain letters other than those contained within the exceptions or suspensions of the monopoly. *See* Request at 16-17. The Postal Service explains that BPM Parcels typically contain books and catalogs, which are not subject to the postal monopoly. *Id.* at 16. It notes that any invoices or receipts (which are letters) accompanying merchandise mailed as BPM Parcels fall within a "cargo" exception. *Id.* at 17. This exception permits letters that "accompany and relate in all substantial respects to some part of the cargo or to the ordering, shipping or delivering of the cargo." *Id.* at 16-17 (citing 39 C.F.R. § 310.3(a)).

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has at least implicitly recognized that a 5 percent price increase is not "significant" in every situation for purposes of section 3642(b)(1).

Furthermore, the Postal Service claims that any incidental, non-addressed, non-personalized advertising accompanying merchandise mailed as Single-Piece fall within the suspension of the Private Express Statutes specified in 39 C.F.R. § 320.7 for that type of mail. *Id.* at 17. The Public Representative agrees that, for these reasons, BPM Parcels will not violate 39 U.S.C. § 3642(b)(2).

3. Section 3642(b)(3) - Additional Considerations

In addition to market power and the letter monopoly, the Commission must also consider: (1) the availability and nature of enterprises in the private sector engaged in the delivery of the product; (2) the views of those who use the product on the appropriateness of the modification; and (3) the likely impact of the modification on small business concerns. 39 U.S.C. § 3642(b)(3). After analyzing these considerations, the Public Representative determines that they are not an impediment to transferring BPM Parcels to the Competitive product list.

a. The Availability and Nature of Private Sector Enterprises

As explained above, the first consideration for the Commission under section 3642(b)(3) is "the availability and nature of enterprises in the private sector engaged in the delivery of the product." 39 U.S.C. § 3642(b)(3)(A). As discussed above, it is apparent that at least some private sector options to BPM Parcels exist.[22] Moreover, as the Commission has stated in a similar context "UPS and FedEx are formidable competitors for delivery of this product" and "[i]f the Postal Service increases [] rates, it should enhance rather than inhibit their competitive position vis-à-vis the Postal Service." *See* Order No. 689 at 16. The Public Representative believes the same is true for BPM Parcels.

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[22] *See* Response to CHIR No. 3, question 1; *see also* Order No. 1411 at 8.

b. The Views of Users of the Product

In terms of the second additional consideration—the views of the customers who use the product in question—the Postal Service asserts that "[g]iven that service standards will remain the same after the proposed transfer, customers' major concerns would likely be the effect of the transfer on prices, and, in particular, the fact that prices will no longer be subject to the inflation-based Market Dominant ratemaking system." Request at 14. However, according to the Postal Service, because "the mailers of BPM Parcels are overwhelmingly highly sophisticated commercial entities that have alternatives for the delivery of their parcels… they are not locked into the Postal Service but rather can shift their volume relatively quickly and do not require the protection of the Market Dominant price cap." *Id.* at 14-15.

Scholastic disputes this point. In its Motion, it states that "private carriers have communicated to Scholastic their unwillingness to process and deliver comparable educational multi-component bundles." Scholastic Motion at 1-2. Instead, "[p]rivate carriers have stated they would only accept containerized shipments, but the cost to Scholastic to retool its operations and to ship these materials in cardboard boxes would be prohibitive and would undermine Scholastic's mission to offer books and other educational materials at reasonable prices." *Id.* at 2. The Postal Service, in response, points out that these types of "educational multi-component bundles" do not make up a large amount of the volume of BPM Parcels and are not particularly representative of BPM Parcels as a whole.[23]

The Postal Service also states that it reached out to "ten large customers of BPM Parcels" in late 2019 to seek their opinions on "pricing[,] possible responses to price increases, such as diversion to other shipping methods or conversion to electronic communication[,] transferring BPM Parcels to the competitive product list[,] and possible responses to and ways to ease such a transition." *Id.*, question 11. According to the Postal Service, those customers opposed the transfer of BPM Parcels to the Competitive product

[23] *See* Responses of the United States Postal Service to Questions 1 – 9a and 10 – 12 of Chairman's Information Request No. 1, April 21, 2021, questions 8, 10 (Response to CHIR No. 1).

list, believing that "a transfer could produce prohibitive costs if they had to change their current business models[,]" and lead to a loss of volume. *Id.* On the other hand, the customers "believed that they could protect all or some of the BPM Parcels business through negotiated service agreements with the Postal Service" and "suggested that a long lead time and sufficient notice before implementing any price increases would ease the transition." *Id.*

The Public Representative appreciates the concerns expressed by Scholastic (and numerous other individuals on Scholastic's behalf) that transferring BPM Parcels to the Competitive product list could result in serious harm to Scholastic and its customers. The Public Representative observes that the Postal Service has significant Market Dominant rate authority at the time of the request, in part because the product does not cover costs.[24] As such, BPM Parcels could face a significant price increase regardless of the outcome of this proceeding. If the product is transferred, however, the Postal Service would have greater flexibility to establish negotiated service agreements, which could help both the Postal Service and its customers (to the extent its customers have buyer market power and can therefore negotiate advantageous prices).

To address the concerns of Scholastic and others, the Public Representative encourages the Commission and the Postal Service to explore the possibility of adding additional destination entry rates to Library Mail for educational material sent to schools (which may require changes to the DMM requirements for Library Mail). This would allow Scholastic (and other similarly-situated customers) to take advantage of dropship rates that are regulated under the Market Dominant product list for the shipment of its "educational multi-component bundles," even if BPM Parcels is transferred.

[24] Postal Regulatory Commission, Available Market Dominant Rate Authority, last updated on May 12, 2021, available *at https://www.prc.gov/sites/default/files/Available%20Rate%20Authority%2005-12-21.pdf*.

c. Small Business Concerns

Under section 3642(b)(3)(C), the Commission must consider the likely impact of the transfer on the concerns of a "small business," which is defined as "a for-profit business entity that: (1) Is independently owned and operated; (2) Is not dominant in its field of operation; (3) Has a place of business located in the United States; (4) Operates primarily within the United States … ; and (5) Together with its affiliates, qualifies as small in its primary industry under the criteria and size standards established by the Small Business Administration in 13 CFR 121.201." 39 C.F.R. § 3010.101(t). The Postal Service explains that the top 20 shippers of BPM Parcels account for 93.6 percent of volume and as such, small businesses are likely to be unaffected. Request at 16. The Public Representative concurs.

B. Compliance with 39 U.S.C. § 3633

In order to transfer BPM Parcels to the Competitive product list, the Commission must examine the product to ensure that: (1) BPM Parcels is not subsidized by Market Dominant products; (2) it covers its attributable costs; and (3) Competitive products collectively cover an appropriate share of institutional costs. *See* 39 U.S.C. § 3633(a).

BPM Parcels only covered 93.8 percent of its attributable costs. Request at 17. As such, the Postal Service "seeks authority from the Commission to implement a price increase under the competitive rules for the category simultaneous with the transfer." *Id.* at 18. Consistent with past precedent, the Public Representative recommends that the Commission approve the Request on the conditions that: (1) the Postal Service files a notice of competitive price adjustment for BPM Parcels rates, that demonstrates such rates satisfy 39 U.S.C. 3633(a) and 39 CFR part 3035; (2) the Commission issues an order finding that the BPM Parcels rates in (1) above satisfy 39 U.S.C. 3633(a) and 39

CFR part 3035; and (3) the BPM Parcels transfer authorized by this order is not effective until the effective date of prices authorized in (b), above.[25]

In terms of 39 U.S.C. § 3633(a)(1) and (3), the Postal Service states, and the Public Representative agrees, that "[e]ven without such an increase, and certainly with the increase, the transfer of BPM Parcels would satisfy [these subsections by covering] their attributable costs and an appropriate share of institutional costs." Request at 18. The Postal Service points out that:

> The target FY 2021 appropriate share of institutional costs to be covered by competitive products is 9.1 percent. Docket No. ACR 2019, Annual Compliance Determination, Mar. 25, 2020, at 89. Given the relatively small size of BPM Parcels in terms of volume and revenue, its transfer would not result in competitive product contribution falling below this target. Even assuming that BPM Parcels contributed $0 in revenue at an additional cost to the Postal Service of $500 million above its actual 2020 costs, and with all other costs and revenues from FY2020 remaining equal, competitive products would still cover 29.0 percent of total institutional costs ($19.9 billion in total attributable costs for competitive products against $30.5 in revenue, a difference of $10.6 billion or 29.0 percent of $36.5 billion in total institutional costs).

Request at 18-19. Under these conditions, there is more than enough revenue to satisfy section 3633(a)(1) and (3).

III. CONCLUSION

The Postal Service has demonstrated, based on the information that it has provided about BPM Parcels' customers and competitors, that it would risk losing a significant level of business to other firms should it set the price of BPM Parcels substantially above costs, raise its prices significantly, or decrease quality or output. *See* 39 U.S.C. § 3642(b)(1). Because of this risk, the transfer of BPM Parcels to the

[25] *See* Order No. 689 at 19; *see also* Docket No. CP2012-2, Order Approving Changes in Rates of General Applicability for Competitive Products, December 21, 2011, at 8-13 (Order No. 1062).

Competitive product list is not precluded by section 3642(b)(1). Moreover, BPM Parcels will not run afoul of the postal monopoly, *see* 39 U.S.C. § 3642(b)(2), and none of the statutorily-recognized additional considerations prohibit transferring BPM Parcels to the Competitive product list. *See* 39 U.S.C. § 3642(b)(3). As such, the Public Representative recommends that the Commission should transfer BPM Parcels subject to it meeting the requirements of 39 U.S.C. § 3633(a).

The Public Representative is also mindful of the concerns raised by Scholastic (and other parties on the company's behalf). Therefore, the Public Representative also suggests that the Commission and the Postal Service explore the feasibility of introducing destination entry rates to Library Mail, for which Scholastic (or other smaller customers) may be eligible.

The Public Representative hereby submits the foregoing comments for the Commission's consideration.

Respectfully submitted,

*/s/ Joseph K. Press*___

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